STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 20, 2007
v	No. 262699 Tuscola Circuit Court
DAVID ALAN RUIZ, Defendant-Appellant.	LC No. 04-009184-FC

Before: Whitbeck, C.J., and Sawyer and Jansen, JJ.

PER CURIAM.

Defendant was convicted on three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f) (personal injury), and two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(f) (personal injury), following a jury trial. Defendant was sentenced to concurrent prison terms of 13 to 20 years for each CSC I conviction and 5 to 15 years for the CSC II convictions. Defendant appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence to support his convictions and that the trial court erred in denying his motion for a new trial in that regard. We disagree. Whether sufficient evidence exists to support a conviction is reviewed de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). A trial court's decision to deny a motion for a new trial is reviewed for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the principled range of outcomes. *People v Babcock*, 469 Mich 246, 269; 666 NW2d 231 (2003).

In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723-724; 597 NW2d 73 (1999). In reviewing the sufficiency of the evidence, the evidence is viewed in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). MCL 750.520h specifically permits CSC convictions on the basis of uncorroborated testimony by the victim.

The essential elements of CSC I as charged in this case are as follows: the defendant "(1) causes personal injury to the victim, (2) engages in sexual penetration with the victim, and (3) uses force or coercion to accomplish the sexual penetration." MCL 750.520b(1)(f); *People v Nickens*, 470 Mich 622, 629; 685 NW2d 657 (2004). MCL 750.520a(1) defines "personal injury" as "bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ." For personal injury purposes, evidence that a victim suffered bruises and tenderness as a result is sufficient to sustain a conviction. *People v Gwinn*, 111 Mich App 223, 239; 314 NW2d 562 (1981). Additionally, some of the factors to consider for finding "mental anguish" include testimony that the victim was upset or crying during or after the assault, the victim's need for psychiatric or psychological care or treatment, the victim's inability to conduct a normal life, such as absence from the workplace, and evidence that the psychological or emotional effects of the assault were long-lasting. *People v Petrella*, 424 Mich 221, 270; 380 NW2d 11 (1985). "Sexual penetration" is statutorily defined in part as "sexual intercourse . . . or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." MCL 750.520a(o). Evidence concerning sexual penetration is sufficient "where the circumstances of the assault and the graphic description of physical sensations strongly point to the achievement of penetration." *People v Hollis*, 96 Mich App 333, 337; 292 NW2d 538 (1980).

The elements of CSC II as charged in this case are that: the defendant (1) caused personal injury to the victim, (2) engaged in sexual contact with the victim, and (3) used force or coercion to accomplish the sexual contact. MCL 750.520c(1)(f).

> "Sexual contact" includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:
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> (*i*) Revenge.
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> (*ii*) To inflict humiliation.
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> (*iii*) Out of anger. [MCL 750.520a(n).]

Here, there was sufficient evidence to support defendant's three CSC I convictions, and the trial court did not abuse its discretion in denying a new trial in that regard. Specifically, the complainant testified that defendant grabbed her arm, forced her to the ground, and penetrated her vagina at least three times. The complainant stated that she felt pain in the back of her legs as if defendant was pinning her down, and the examining doctor stated that the complainant had bruising behind her knees. Moreover, the complainant testified that she experienced severe psychological trauma at the time of the assault and for a period of time after the assault, which required hospitalization. Because issues of credibility are properly left for the jury, *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999), the testimony was sufficient to support those convictions. We disagree that the complainant's testimony was sufficiently impeached to render her incredible. *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998). And concerning the complainant's testimony that she was penetrated three separate times, there is no

evidence to suggest that the complainant did not mean what she said, and all reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

Additionally, there was sufficient evidence to support defendant's two CSC II convictions, and the trial court did not abuse its discretion in denying a new trial in that regard. Along with the above testimony, the complainant stated that defendant moved his hand up her shirt and under her bra and that she felt him touch her vagina. Therefore, because issues of credibility are properly left for the jury, *Avant, supra* at 506, there was sufficient evidence to support those convictions as well.

Defendant next argues that the convictions were against the great weight of the evidence, and he has properly preserved this issue by raising it in a motion for a new trial. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id.* at 218-219. We conclude that the convictions were not against the great weight of the evidence based on the evidence and testimony presented at trial.

Defendant argues that his two CSC I convictions and his two CSC II convictions violate the Double Jeopardy Clauses of the United States and Michigan Constitutions, US Const, Am V and Const 1963, art 1, § 15. We disagree.

"The prohibition against double jeopardy provides three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). When the double jeopardy issue is based on a claim of multiple punishments, legislative intent is determinative. *People v Robideau*, 419 Mich 458, 485; 355 NW2d 592 (1984). Additionally, the *Blockburger*[1] test, which was developed for double jeopardy purposes when a single act falls within the scope of two statutes, does not apply when multiple punishment under a single statute is in issue. *Id.* at 483, 486.

Our Supreme Court has held that a single act of penetration accompanied by multiple aggravating circumstances cannot result in multiple convictions and sentences under MCL 750.520b. *People v Johnson*, 406 Mich 320, 331; 279 NW2d 534 (1979). While citing the above language in *Johnson*, this Court has concluded that a defendant was wrongfully convicted and sentenced on multiple counts of CSC where there was evidence "of only a single continuing transaction." *People v Armstrong*, 100 Mich App 423, 428; 298 NW2d 752 (1980), citing *Johnson, supra* at 331. Without reciting the relevant facts in detail, the Court in *Armstrong* reasoned that "[t]he events in question were confined to a single location and occurred within a brief time span lasting approximately five minutes." *Id.* In a case factually dissimilar to *Armstrong* that involved a defendant who penetrated multiple victims, this Court reasoned that Michigan courts have consistently held that the legislative intent concerning CSC was to punish

[1] *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

each criminal sexual penetration separately. *People v Wilson*, 196 Mich App 604, 608; 493 NW2d 471 (1992), citing *Johnson, supra* at 330; *People v Dowdy*, 148 Mich App 517, 521, 384 NW2d 820 (1986); *People v Nelson*, 79 Mich App 303, 261 NW2d 299 (1977), vacated in part 406 Mich 1020 (1979). In *Wilson*, the Court concluded that no double jeopardy violation occurred because "convictions for two acts of penetration that occurred at the same time are not for the 'same offense[.]'" *Id.* The Court noted that to hold otherwise would allow, for example, an individual to vaginally and anally penetrate a victim simultaneously. *Id.* at 608 n 2.

Defendant in this case relies on *Armstrong* in arguing that a double jeopardy violation occurred because the sexual assault here occurred at a single location and within a short period of time. However, *Armstrong* is distinguishable because that decision did not expressly involve multiple penetrations and apparently involved a single penetration involving more than one aggravating circumstance under MCL 750.520b. See *Armstrong, supra* at 428 (reasoning that "a single penetration" cannot result in multiple convictions when accompanied with more than one aggravating circumstance under MCL 750.520b). Moreover, while somewhat factually dissimilar because the decision involved multiple victims, the Court in *Wilson* concluded that the Legislature intended on punishing each separate criminal sexual penetration. *Wilson, supra* at 608. It therefore follows that the Legislature intended under MCL 750.520c to punish each separate criminal sexual contact as well. The plain language of both MCL 750.520b and MCL 750.520c support these conclusions because there is no language to suggest otherwise in either section. Therefore, because the complainant testified that defendant penetrated her vaginally three times and touched her breast and her vagina, no double jeopardy violation occurred.

Defendant next argues that a number of alleged trial court errors denied him a fair trial first alleging that his constitutional right of confrontation was violated, US Const, Am VI and Const 1963, art 1, § 20. We disagree that defendant was denied a fair trial.

A question of constitutional law is reviewed de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). "A defendant's right of confrontation is guaranteed through three devices: cross-examination, the oath, and demeanor." *People v Lawson*, 124 Mich App 371, 374; 335 NW2d 43 (1983), citing in part *California v Green*, 399 US 149; 90 S Ct 1930; 26 L Ed 2d 489 (1970). A defendant's right of confrontation is violated if an individual testifies over the telephone because a defendant is unable to view the witness's demeanor. *Lawson, supra* at 373-374. However, a preserved constitutional error under the Confrontation Clause is harmless if it is clear beyond a reasonable doubt that a rational jury would have found defendant guilty absent the error. *People v Shepherd*, 472 Mich 343, 347-348; 697 NW2d 144 (2005).[2] Factors to consider when determining whether an error is harmless include the importance of the witness' testimony and the strength of the prosecution's case. *People v Kelly*, 231 Mich App 627, 644-645; 588 NW2d 480 (1998).

[2] Contrary to defendant's claim, the Court in *Shepherd* plainly indicated that a preserved claim of constitutional violation of the Confrontation Clause is not a structural error and is subject to a harmless error analysis. *Shepherd, supra* at 348.

Here, concerning testimony relevant to the charges, the examining doctor testified that the complainant appeared frightened and was crying while being examined, complained of mild abdominal pain, and had faint bruising behind her knees. The examining nurse similarly testified that the complainant was crying and appeared scared while being examined, had some bruising on her knees, and complained of abdominal and vaginal pain. Therefore, because the examining doctor's testimony was cumulative, the violation was harmless. See, e.g., *People v Solomon*, 220 Mich App 527, 531; 560 NW2d 651 (1996).

Defendant next argues that the trial court denied his right to present a defense by not adjourning the trial and requiring the prosecution to do DNA testing of the smears as purportedly ordered previously by the trial court. We disagree that the prosecution failed to comply with the trial court's order for testing.

Specifically, the order for testing provides as follows:

> [T]he Prosecution shall conduct scientific testing for the presence of semen or DNA on the clothing (and now in evidence) worn by the complainant, and also on any fluids or biological samples collected from the complainant by medical personal [sic] at the time of the complainant's sexual assault medical examination.

The plain language of the order provides that the prosecution was to conduct testing for semen *or* DNA on any smears taken from the complainant. A Michigan State Police Crime Lab Forensic Scientist testified that she tested the vaginal smears for seminal fluid and found none. Therefore, we disagree that the prosecution erred by not testing the smears for foreign DNA because the order was not as broad as defendant suggests. Nevertheless, if the order required testing, we disagree that defendant was prejudiced by the failure to conduct such testing.

The United States Supreme Court has discussed in depth "what might loosely be called the area of constitutionally guaranteed access to evidence." *United States v Valenzuela-Bernal*, 458 US 858, 867; 102 S Ct 3440; 73 L Ed 2d 1193 (1982). The prosecution's failure to conduct a test, the exculpatory value of which is unknown, does not violate the Due Process Clause unless a defendant demonstrates that prejudice resulted from the prosecution's failure to perform DNA tests or demonstrates that the missing tests were material to the defense.[3] See *Strickler v Greene*, 527 US 263, 281-282, 290-291; 119 S Ct 1936; 144 L Ed 2d 286 (1999). "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v Bagley*, 473 US 667, 682; 105 S Ct 3375; 87 L Ed 2d 481 (1985).

[3] Part of defendant's apparent strategy at trial was to suggest that the complainant had sexual contact with another individual the night after the alleged sexual assault. On appeal, defendant claims that if DNA from that individual were found on the vaginal smears, "it would directly impeach the complainant's testimony that such other things had not occurred and could be an alternative source of her complaints and would generally buttress the defendant's case."

Here, there is not a reasonable probability that further testing would have changed the result of the trial. Specifically, in support of the complainant's claim, many witnesses who saw the complainant immediately after the assault testified that she was visibly shaken and crying. Significantly, there were no witnesses to support defendant's claim that the complainant was not upset immediately following the assault. Moreover, the complainant's mother testified that the complainant had become extremely withdrawn and suicidal after the assault occurred. As a result, even if the complainant's testimony was discredited by failing to disclose sexual relations with another individual the day after the assault,[4] there is no reasonable probability this would have changed the verdict.

Defendant next argues that he was denied a fair trial because the trial court refused to allow defense counsel to impeach the complainant by calling a witness to rebut her claim that she had not visited the Deja Vu Men's Club after the assault occurred. We disagree.

A trial court's decision to allow the late endorsement of a witness is reviewed for an abuse of discretion, *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995), as is a decision to admit evidence, *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). MCL 767.40a(4) permits the prosecutor's late endorsement of a witness at any time upon leave of the court and for good cause shown. Generally, the late endorsement of a witness is permitted and a continuance is granted if necessary to prevent possible prejudice to the defendant. *People v Suchy*, 143 Mich App 136, 141; 371 NW2d 502 (1985). However, a party cannot introduce evidence on rebuttal unless it relates to a substantive rather than a collateral matter. *People v Losey*, 413 Mich 346, 351-353; 320 NW2d 49 (1982).

Here, the trial court did not abuse its discretion by failing to allow defendant's late endorsement of a witness to rebut the complainant's testimony because, as concluded by the trial court, the proposed testimony involved a collateral matter. Specifically, the proposed, extrinsic evidence was to impeach on a matter that was not relevant to whether defendant committed the assault but rather whether the complainant on a particular occasion many months after the assault decided to go out rather than stay at home. While this may have been evidence that the complainant was not as withdrawn after the assault as she suggested during trial, not allowing the late endorsement was plainly not an abuse of discretion even if this amounted to a close evidentiary issue. *People v Geno*, 261 Mich App 624, 632; 683 NW2d 687 (2004).

Defendant next argues that the trial court denied his right to a fair trial by failing to prevent the prosecution from committing alleged acts of misconduct. However, as concluded below, none of the alleged acts of misconduct prejudiced defendant. Therefore, defendant's argument is without merit.

Defendant next argues that he was denied a fair trial because of numerous acts of alleged prosecutorial misconduct. We disagree. Unpreserved[5] claims of prosecutorial misconduct are

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[4] We do not mean to suggest that there is any particular reason to conclude that the complainant misrepresented this matter.

[5] Defendant failed to preserve this issue because the alleged prosecutorial acts of misconduct were not objected to below and are therefore unpreserved. *Geno, supra* at 626. While defendant

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reviewed for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *People v Rice* (*On Remand*), 235 Mich App 429, 438; 597 NW2d 843 (1999). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Generally, appellate review of alleged improper prosecutorial remarks is precluded absent an objection because the trial court is deprived of its opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). But an exception exists where a failure to consider the error would result in a miscarriage of justice or if a curative instruction could not have eliminated the prejudicial effect. *Id.*

Except for one claim of misconduct, we find that the prosecutor did not act improperly. Defendant's sole valid claim is that the prosecutor improperly questioned the investigating officer who in turn testified that he did not find any individuals to corroborate defendant's story and that he did not believe defendant. Defendant argues that the investigating officer's testimony in both instances amounted to him improperly providing an opinion about defendant's credibility. Assuming plain error, we conclude that the error did not affect defendant's substantial rights.

Generally, it is improper for a witness to comment on the credibility of another witness since credibility issues are to be determined by the trier of fact. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985); *People v Smith*, 158 Mich App 220, 230; 405 NW2d 156 (1987). In *Smith*, numerous errors occurred requiring reversal including when the prosecution elicited testimony from police witnesses who testified regarding the credibility of the prosecution's key witness. *Id.* at 230-231. However, this Court noted that the evidence against the defendant was not overwhelming and that the error, by itself, was harmless. *Id.* at 225.

Here, both the complainant and defendant testified, and the jury had an opportunity to view their demeanor and assess their credibility first hand. Moreover, while defendant did not provide any witnesses to substantiate his claim on what occurred after the assault took place, the prosecution elicited testimony from numerous witnesses to support the complainant's claim. Therefore, based on the weight of the evidence against defendant, we conclude that the error was harmless.

Defendant next claims that *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006), was wrongly decided relying on several decisions from the United States Supreme Court. However,

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did object during trial based on speculation when the prosecution asked the investigating officer what his reasons were for not believing defendant, a party must object at trial for the same grounds as argued on appeal to preserve an evidentiary issue. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Therefore, defendant has failed to preserve that particular claim of misconduct as well. *Geno, supra* at 626.

defendant's argument fails because this Court is bound by decisions from our Supreme Court, *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993), including *Drohan* where our Supreme Court held that *Blakely* does not apply to sentences imposed in Michigan that are, as in this case, below the statutory maximum. *Drohan, supra* at 160.

Defendant next argues that offense variable (OV) 4, MCL 777.34, was incorrectly scored at ten points. We disagree that the scoring was improper. A question of statutory interpretation is a question of law reviewed de novo. *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005). A sentencing court has discretion in scoring offense variables if record evidence supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

Under MCL 777.34(1)(a), a defendant is scored ten points under OV 4 when "[s]erious psychological injury requiring professional treatment occurred to a victim." A sentencing court may consider all record evidence before it, including the contents of a presentence investigation report or testimony taken at a preliminary examination or trial. *People v Ratkov* (*After Remand*), 201 Mich App 123, 125; 505 NW2d 886 (1993).

Here, the complainant testified that after the assault, she slept on the couch so her parents could hear if she screamed, she was scared for herself, her family, and her friends, she suffered panic attacks, she was unable to return to work, and she underwent counseling and was hospitalized after becoming suicidal. Plainly, the complainant's testimony supports a finding that she suffered a serious psychological injury requiring professional treatment under MCL 777.34(1)(a).

Defendant next argues that OV 11, MCL 777.41, was incorrectly scored at 50 points relying on his previous argument that it was constitutionally improper to convict defendant of three separate counts of CSC I. We disagree that the scoring was improper given our previous conclusion that the convictions were not improper under the statute. OV 11 provides that 50 points should be scored if two or more sexual penetrations occurred. MCL 777.41(1)(a). The statute also provides:

> All of the following apply to scoring offense variable 11:
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> (a) Score all sexual penetrations of the victim by the offender arising out of the sentencing offense.
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> (b) Multiple sexual penetrations of the victim by the offender extending beyond the sentencing offense may be scored in offense variables 12 and 13.
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> (c) Do not score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense. [MCL 777.41(2).]

Here, defendant sexually penetrated the complainant three separate times. Thus, MCL 777.41(2) provides that all penetrations arising from the entire assault are scored except for the penetration that forms the basis for the sentencing offense. *People v Wilkens*, 267 Mich App

728, 743; 705 NW2d 728 (2005). Therefore, while one CSC I conviction cannot be scored, MCL 777.41(2)(c), the remaining two were properly scored at 50 points, MCL 777.41(1)(a) and (2)(a), because those penetrations occurred during the entire assault.

Defendant next argues that OV 13, MCL 777.43, was incorrectly scored at 25 points. We disagree that the scoring was improper. As to OV 13, 25 points are properly scored where the offense is part of a pattern of felonious criminal activity involving three or more crimes against a person. MCL 777.43(1)(b). That statute also provides:

> (2) All of the following apply to scoring offense variable 13:
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> (a) For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.
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> (c) Except for offenses related to membership in an organized criminal group, do not score conduct scored in offense variable 11 or 12. [MCL 777.43(2)(a), (c).]

Initially, defendant's reliance on his previous arguments for arguing that OV 13 was improperly scored is without merit given our prior conclusions. Further, the two CSC II convictions can be scored under MCL 777.43(2)(a) because that subsection plainly includes the crime that constitutes the sentencing offense. And while the two CSC I convictions scored in OV 11 could not be scored under OV 13, MCL 777.43(2)(c), the remaining CSC I conviction can be scored under MCL 777.43(2)(a) because, again, that subsection plainly includes the crime that constitutes the sentencing offense.

Defendant argues that MCL 777.41(2)(b) prohibits scoring the penetration that forms the basis of the sentencing offense for purposes of OV 11, i.e., the CSC I conviction that was not scored as prohibited by MCL 777.41(2)(c). However, when MCL 777.41(2)(b) and MCL 777.43(2)(a) and (c) are read in context, those subsections plainly provide that for purposes of scoring OV 13, those penetrations not scored under OV 11 may be scored under OV 13, including the sentencing offense that could not be scored under OV 11. MCL 777.41(2)(b) does not prohibit any scoring of a sexual penetration under OV 13 but rather provides that multiple penetrations may be scored under OV 13 subject to the limitations in MCL 777.43(2)(c). Thus, defendant's argument is without merit.

Defendant finally argues that he was denied effective assistance of counsel. A preserved claim of ineffective assistance of counsel involves a mixed question of law and fact. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). The trial court's factual findings are reviewed for clear error, and its constitutional determinations are reviewed de novo. *Id.*

To establish a claim of ineffective assistance of counsel, a defendant bears a heavy burden. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Specifically, a defendant must show that counsel's performance was objectively unreasonable and that, but for defense

counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *Id.* at 600. In addition, there is a strong presumption that defendant's counsel's performance was sound trial strategy. *Id.*

Here, the trial court found defense counsel acted based on reasonable professional judgment and reasoned that the claim must fail because all of the premised claims of error were without merit. We conclude that no clear error occurred and that defense counsel was not constitutionally ineffective. Concerning the alleged errors that were without merit, defense counsel was not ineffective for failing to raise those arguments at trial. See *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004) (failure to make a futile objection does not constitute ineffective assistance of counsel). And concerning the actual errors that did occur, defendant has failed to establish sufficient prejudice to show that his trial counsel was constitutionally ineffective. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). Therefore, defendant's claim is without merit.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kathleen Jansen